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In the Matter of

Digital Performance Right in Sound
Recordings and Ephemeral Recordings

Docket No. 99-6 CARP DTRA

ORDER

The following motions are addressed in this Order: 1) the Recording Industry Association of America's ("RIAA's") motion to exchange written direct cases and commence the precontroversy discovery period on April 17, 2000; 2) a motion to accept late-filed Notices of Intent to Participate from TuneTo.com, Inc. ("TuneTo"), SOUNDSBIG.com, Inc. ("Soundsbig"), RadioActive Media Partners, Inc. ("RadioActive") and Rob Glaser, CEO of RealNetworks, Inc. ("Glaser"); and 3) a motion to accept a late-filed Notice of Intent to Participate from the Association for Independent Music ("AFIM").

There is also a motion to consolidate this proceeding for the 1998-2000 time period with the rate adjustment proceeding for the 2001-2002 time period filed by ABC, Inc.; AEI Music Network, Inc.; America Online, Inc.; American Broadband Productions, LLC; BET.com; CBS Corporation; CDnow Online, Inc.; Digital Bitcasting Corp.; The Eclectic Radio Company LLC; Everstream, Inc.; iGroove.com, Inc.; Launch Media, Inc.; Live365.com; MTV Networks; NetRadio Corporation; Radiowave.com, Inc.; Rolling Stone Radio/Real Networks; Tunes.com, Inc.; The Walt Disney Company; Westwind Media.com, Inc.; Yahoo! Inc.; AMFM, Inc. and Clear Channel Communications, Inc.; National Public Radio; and Music Choice (collectively referred to as the "Movants"). Movants' motion will be resolved in a separate order.

Hovering over these motions, and the entire proceeding, is a petition for rulemaking filed by RIAA. RIAA "requests that the Copyright Office commence a rulemaking to address the proper scope of the 'broadcast transmission' exemption in section 114(d)(1)(A) of the Copyright Act and the statutory licenses in section 112(e) and 114(d)(2) of the Act. Specifically, RIAA urges the Copyright Office to adopt a rule clarifying that a broadcaster's transmission of its AM or FM radio station over the Internet . . . is not exempt from copyright liability under section 114(d)(1)(A)." RIAA Petition at 1. Although RIAA's petition for rulemaking is technically not a pleading in this docket, the resolution of the petition could have a dramatic impact on this proceeding, and some of the pending motions.

RIAA's Petition for Rulemaking

On March 1, 2000, RIAA filed a petition for a rulemaking by the Copyright Office on the scope and applicability of the statutory license provisions of sections 112 and 114 of the Copyright Act. Specifically, RIAA seeks an interpretation of the scope of the broadcast transmission exemption contained in section 114(d)(1)(A). RIAA submits that the exemption must be clarified to exclude broadcaster transmissions of AM and FM radio stations over the Internet. Under this approach, broadcasters who did transmit AM and FM radio stations over the Internet, would have to qualify for the statutory licenses in sections 112(e) and 114(f), or negotiate private copyright licenses, before they could make such transmissions.

RIAA asserts that such a rulemaking is necessary because it has had disagreements with broadcasters over whether broadcaster transmissions on the Internet are covered by the section 112(e) and 114(f) licenses, and consequently has not been able to reach settlements over rates and terms with broadcasters. If broadcasters are not covered by the section 114(d)(1)(A) exemption, and they do not execute private agreements, then the outcome of this proceeding will affect the terms and rates they must pay under the statutory licenses for their transmissions.

On March 16, the Copyright Office published a Notice of Proposed Rulemaking ("NPRM") in the **Federal Register** seeking comments on a proposed amendment to section 201.35 of the Office's rules to include broadcaster transmissions of AM and FM signals over the Internet within the section 114 license. Comments are due on the NPRM no later than April 17, 2000, with reply comments due on May 1, 2000. See 65 FR 14227 (March 16, 2000).

After receiving RIAA's petition for rulemaking, those parties seeking consolidation of this proceeding with the 2001-2002 rate adjustment (i.e. the "Movants") filed a letter with the Library supporting RIAA's position that the status of broadcaster transmissions of AM and FM radio stations over the Internet should be resolved outside the context of this proceeding, and arguing that consolidation will give the Copyright Office further time to resolve the rulemaking prior to commencement of the CARP.

RIAA responded to Movants' letter, arguing that its petition for rulemaking has nothing to do with consolidation and is not a prerequisite to commencement of this proceeding. RIAA submits that broadcasters have been aware of the dispute regarding the section 114(d)(1)(A) exemption for some time (having invoked the exemption in settlement negotiations), are already parties to this proceeding, and that "it would be inappropriate to hold up the entire rate proceeding simply to issue an advance ruling on a legal issue that concerns the liability of only one group of webcasters (*i.e.*, the broadcasters)." RIAA Opposition at 3-4.

RIAA's Motion for an April 17, 2000, Starting Date

RIAA has requested that the precontroversy discovery period in this proceeding begin on April 17, 2000, and asserts that the recent commencement of a rulemaking proceeding to decide the scope of the broadcast transmission exemption contained in section 114(d)(1)(A) of the Copyright Act should have no impact on the timetable for this CARP proceeding. However, the Library concludes that the rulemaking may well decide issues that have a significant impact on the identity of the parties to this proceeding and on the rates and terms adopted in this proceeding. It is inadvisable to commence this proceeding prior to the conclusion of the rulemaking. Consequently, RIAA's motion for an April 17 start date must be denied.

The Copyright Office intends to conclude the rulemaking proceeding in an expedited fashion. The Library will publish a schedule for this proceeding promptly after the rulemaking is concluded and will address Movants' motion for consolidation in the same order.

Motion to Accept Late Filed Notices of Intent to Participate of TuneTo, Soundsbig, RadioActive and Glaser

In support of their motion, TuneTo, Soundsbig, and RadioActive submit that they are all recently launched (and in the case of RadioActive, yet to be launched) webcast ventures that will be affected by the outcome of this proceeding and that were not aware of the November 1 deadline. Glaser, who is CEO of RealNetworks, Inc. which is already a party to this proceeding, seeks to participate in this proceeding in his individual capacity.

RIAA does not oppose admittance of TuneTo, Soundsbig, and RadioActive but does oppose inclusion of Glaser. RIAA states that it is not aware of any rate adjustment or distribution proceeding where an employee of a participant has participated in his/her individual capacity.

In reply, Glaser provides a list of his accomplishments in the area of streaming video and the Internet, and states that he "is prominently involved, in terms of both personal activity and financial investment, in a number of activities involving streaming media unrelated to his role as the CEO of RealNetworks." Reply at 5. Glaser does not, however, specifically state what his interest is in the adjustment of the rates for the section 112 and 114 statutory licenses.

For the reasons stated in the November 30, 1999, and December 22, 1999, Orders in this proceeding concerning motions to accept late-filed Notices of Intent to Participate, the motion of TuneTo, Soundsbig, and RadioActive is granted. Glaser's motion, however, is a more difficult case.

Section 802(c) provides in pertinent part:

Any copyright owner who claims to be entitled to royalties under section . . . 112, 114 . . . , any transmitting organization entitled to a statutory license under section 112(f), any person entitled to a statutory license under section 114(d) . . . , may submit relevant information and proposals to the arbitration panels in proceedings applicable to such copyright owner or interested copyright party, and any other person participating in arbitration proceedings may submit such relevant information and proposals to the arbitration panel conducting the proceedings.

17 U.S.C. § 802(c). Section 802(c), far from a model of clarity, seems to suggest that some specific interest in the royalty rates (such as a copyright owner entitled to royalties generated by those rates, or a copyright user who must pay those rates) is required to participate in the CARP proceeding; a general interest is not sufficient. It is unclear how Glaser fits into this standing requirement, particularly where the company for which he is the chief executive officer is already a participant. Consequently, Glaser is directed to show written cause, no later than April 17, 2000, as to what his interest is in this proceeding that satisfies section 802(c) and that is not already represented by the participation of RealNetworks. The normal time periods for oppositions and replies under 37 C.F.R. § 251.44(g) apply to Glaser's show cause pleading.

Motion to Accept Late-Filed Notice of Intent to Participate of AFIM

AFIM submits that it is not routinely involved in compulsory licensing copyright issues, and consequently did not learn of this proceeding until after the November 1, 1999, deadline for Notices of Intent to Participate. It asserts that it should be admitted to this proceeding because admission will not cause disruption or prejudice to the other parties since there is currently not a fixed schedule for commencement. Moreover, AFIM argues that its contributions to this proceeding are important because it represents the interests of the independent music industry, including record companies who are not members of the RIAA collective.

No oppositions to AFIM's motion were interposed.

For the reasons stated in the November 30, 1999, and December 22, 1999, Orders in this proceeding concerning motions to accept late-filed Notices of Intent to Participate, AFIM's motion is granted.

Wherefore, **IT IS ORDERED:**

- 1) RIAA's motion to commence the precontroversy discovery schedule on April 17, 2000, **IS DENIED;**
- 2) The motion to accept the late-filed Notices of Intent to Participate of TuneTo, Soundsbig, and RadioActive **IS GRANTED**, and Glaser is directed to show written cause no later than April 17, 2000, as to why he has standing to participate in this proceeding; and
- 3) The motion to accept the late-filed Notice of Intent to Participate of AFIM **IS GRANTED.**

SO ORDERED.

Marybeth Peters
Register of Copyrights

BY: 

William J. Roberts, Jr.
Senior Attorney

DATED: March 21, 2000